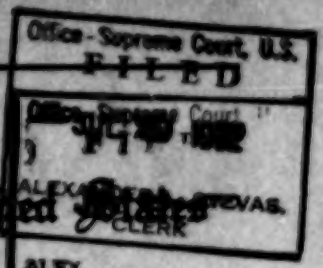
Nos. 81-2124 & 81-2306



In The

Supreme Court of the United States

October Term, 1981

BOSTON ASSOCIATION OF SCHOOL ADMINISTRATORS AND SUPERVISORS, AFL-CIO,

Petitioner,

vs.

TALLULAH MORGAN, et al.,

Respondents.

LOCAL 66, BOSTON TEACHERS UNION, AFT, AFL-CIO,

Petitioner,

vs.

BOSTON SCHOOL COMMITTEE, et al.,

Respondents.

In Opposition to a Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

BRIEF FOR RESPONDENTS TALLULAH MORGAN, ET AL. AND EL COMITE DE PADRES

LARRY J. JOHNSON
ROBERT PRESSMAN
Center for Law & Education
6 Appian Way
Cambridge, Massachusetts 02138
(617) 495-4666
Attorneys for Respondents Tallulah Morgan, et al.

CAROLINE B. PLAYTER
National Lawyers Guild
DOYLE, PLAYTER, NOVICK & BERKIN
100 Boylston Street, Suite 900
Boston, Massachusetts 02116
(617) 482-5200

KENNETH KIMERLING
Puerto Rican Legal Defense Fund, Inc.
95 Madison Avenue
New York, New York 10016
(212) 532-8470
Attorneys for Respondents El Comite De Padres

7042
LUTZ APPELLATE PRINTERS, INC.
NY (212) 840-9494 • (516) 222-1686 • (914) 683-0083
NJ (201) 257-6850 • PA (215) 563-5587 • DC (202) 783-7288 • MA (617) 542-1114

TABLE OF CONTENTS

Page

Statement of the Case 3

Reasons for Denying the Writ:

I. The District Court's orders for the desegregation of the faculty and administration of the Boston school system were proper. 7

II. The District Court orders of June 2, 1981 were proper. 8

III. The District Court's orders of July 9, 1981 were proper. 10

IV. The orders of June 2, 1981 and July 9, 1981 do not unnecessarily or invidiously trammel the interests of white teachers and administrators..... 11

V. The orders of the District Court are in accordance with the opinions from other circuits. 13

Conclusion 14

TABLE OF CITATIONS

Cases Cited:

Arthur v. Nyquist, 415 F. Supp. 904 (W.D.N.Y. 1976), affirmed in pertinent part, 573 F. 2d 134 (2nd Cir. 1978), cert. denied, 439 U.S. 860 (1978) 9

Arthur v. Nyquist, 520 F. Supp. 961 (W.D.N.Y. 1981) .. 13

Contents

Page

Associated General Contractors v. Altshuler, 490 F. 2d 9 (1st Cir. 1973), cert. denied, 416 U.S. 957 (1974)..... 7

Boston Chapter N.A.A.C.P., Inc. v. Beecher, 504 F. 2d 1017 (1st Cir. 1974), cert. denied, 421 U.S. 910 (1975).... 7

Boston Chapter N.A.A.C.P., Inc. v. Beecher, 522 F. Supp. 873 (D. Mass. 1981) No. 82-1642 (1st Cir. May 11, 1982) 13

Brown v. Board of Education, 349 U.S. 294 (1955)..... 11

Brown v. Neeb, 644 F. 2d 551 (6th Cir. 1981) 8

Detroit Police Officers Association v. Young, 608 F. 2d 671 (6th Cir. 1979) 12, 13

Franks v. Bowman Transportation Co., 424 U.S. 747 (1976)..... 12

Fullilove v. Klutznick, 448 U.S. 448 (1980) 7

Green v. County School Board, 391 U.S. 430 (1968)..... 8

International Brotherhood of Teamsters v. United States, 431 U.S. 324 (1977)..... 7

Louisiana v. United States, 380 U.S. 145 (1965)..... 8

Milliken v. Bradley, 433 U.S. 267 (1977).....8, 9, 10

Morgan v. Hennigan, 379 F. Supp. 410 (D. Mass. 1974), aff'd sub. nom., Morgan v. Kerrigan, 509 F. 2d 580 (1st Cir. 1974), cert. den., 421 U.S. 963 (1975) 3, 7, 8

Contents

Page

Morgan v. Kerrigan, 388 F. Supp. 581 (D. Mass. 1975), aff'd, 530 F. 2d 431 (1st Cir. 1976), cert. denied, 426 U.S. 935 (1976) 4, 5, 7, 14

Morgan v. O'Bryant, 671 F. 2d 23 (1st Cir. 1982) 6

Morrow v. Crisler, 491 F. 2d 1053 (5th Cir. 1974), cert. denied, 419 U.S. 895 (1975) 7

Oliver v. Kalamazoo Board of Education, 368 F. Supp. 143 (W.D. Mich. 1973), aff'd, 508 F. 2d 178 (6th Cir. 1974), cert. denied, 421 U.S. 963 (1975) 9, 13

Pellicer v. Brotherhood of Railway and S.S. Clerk, 217 F. 2d 205 (5th Cir. 1954), cert. denied, 349 U.S. 912 (1955) 12

Regents of the University of California v. Bakke, 438 U.S. 265 (1978) 7, 12

Stotts v. Memphis Fire Department, Nos. 81-5348 and 81-5349 (6th Cir. May 7, 1982) 13

United States v. City of Miami, 614 F. 2d 1322 (5th Cir. 1980) 13

United States v. Montgomery County Board of Education, 395 U.S. 225 (1969) 9

Valentine v. Smith, 654 F. 2d 503 (8th Cir. 1981) 12

Wright v. Council of City of Emporia, 407 U.S. 451 (1972) 11

Contents

Page

Other Authorities Cited:

Cronin, Joseph M., *Organizing an Urban School System for Diversity: A Report on the Boston Public School Department,* October 1970, pp. 170-71 9

U.S. Select Senate Committee on Equal Educational Opportunity, *Toward Equal Educational Opportunity,* Report No. 92-000, 92nd Congress, 2d Session 9, 10

U.S. Commission on Civil Rights, *Fulfilling the Letter and Spirit of the Law, Desegregation of the Nation's Public Schools,* August 1976 .....9, 10

APPENDIX

Memorandum and Orders on Plaintiffs' Motion as to Administrator Desegregation Filed August 24, 1976 .....1a

Memorandum and Further Orders on Faculty Recruiting and Hiring 6a

School Defendants' Motion for Modification of Faculty Desegregation Orders 11a

Order Modifying Faculty Desegregation Orders..... 12a

Motion for Modification of Administrator Desegregation Orders to Permit Reassignment and Reduction of Headmasters and Principals for the 1981-82 School Year by Means of Seniority 14a

Nos. 81-2124 and 81-2306

In The

Supreme Court of the United States

October Term, 1981

BOSTON ASSOCIATION OF SCHOOL ADMINISTRATORS AND SUPERVISORS, AFL-CIO,

Petitioner,

vs.

TALLULAH MORGAN, et al.,

Respondents.

LOCAL 66, BOSTON TEACHERS UNION, AFT, AFL-CIO,

Petitioner,

vs.

BOSTON SCHOOL COMMITTEE, et al.,

Respondents.

In Opposition to a Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

BRIEF FOR TALLULAH MORGAN, ET AL. AND EL COMITE DE PADRES

The plaintiffs-respondents Tallulah Morgan, et al., black parents and their children attending the Boston Public Schools,

and El Comite de Padres, representing Hispanic parent intervenors, oppose the petitions for certiorari being brought by Local 66, Boston Teachers Union (hereafter BTU), AFL-CIO and the Boston Association of School Administrators and Supervisors, AFL-CIO (hereafter BASAS) to review a February 17, 1982 judgment of the United States Court of Appeals for the First Circuit.

STATEMENT OF THE CASE

This is a school desegregation case brought in 1972 by black parents and their children enrolled in the Boston Public Schools. Respondents (hereinafter plaintiffs) alleged that the "city defendants have intentionally brought about and maintained racial segregation in the Boston Public Schools" and that various school department practices, including the discrimination in the hiring, assignment and promotion of black faculty and administrators, "deny black children their constitutional right to equality of educational opportunity under the Fourteenth Amendment". *Morgan v. Hennigan,* 379 F. Supp. 410, 461 (D. Mass. 1974), *aff'd sub. nom. Morgan v. Kerrigan,* 509 F. 2d 580 (1st Cir. 1974), *cert. denied,* 421 U.S. 963 (1975).

In 1974, the District Court ruled that "[t]he defendants have knowingly carried out a systematic program of segregation affecting all of the city's students, teachers and school facilities and have intentionally brought about and maintained a dual school system". (379 F. Supp. at 482.) With regard to staffing, the court found specifically that the "defendants have violated the constitutional right of public school students to have the school system operated free of racial discrimination in the recruiting, employment and promotion of teachers and staff". (379 F. Supp. at 456.)[1] The court then ordered that the defendants "shall eliminate every form of racial segregation in the public schools

---

1. The Court of Appeals in affirming the District Court's findings held that, "The discriminatory hiring practices, segregative assignment and transfer policies, and the promotion system which perpetuated in administrative positions the effects of discriminatory hiring, have further combined to buttress the segregated nature of the school system. Their cumulative effect was to isolate black students, black teachers and black administrators in a limited number of schools, thereby denying to those students the equal educational opportunity to which they are constitutionally entitled." *Morgan, supra,* 509 F. 2d at 597-98.

of Boston, including all consequences and vestiges of segregation previously practiced by the defendants". (*Id.* at 484.)

To remedy the "consequence" of the nonhiring of black faculty, caused by the discriminatory hiring practices of the school defendants, the District Court ordered in part that the school system hire "black and white teachers . . . on a one-for-one basis until the percentage of black faculty in the school reaches 20%". *Morgan v. Kerrigan,* 388 F. Supp. 581, 583 (D. Mass. 1975), *aff'd,* 530 F. 2d 431 (1st Cir. 1976), *cert. denied,* 426 U.S. 935 (1976). Additionally, the school defendants were ordered to continue the affirmative recruitment of blacks until they constituted 25% of the faculty. (*Morgan, supra,* 388 F. Supp. at 584.)

The BTU, a petitioner in the present action, took an appeal from these orders of the District Court, but the Court of Appeals rejected the claim that the remedy is "an unlawful racial preference". (*Morgan, supra,* 530 F. 2d at 431.) The court declared:

> "This argument fundamentally misapprehends the nature of this case. The plaintiffs are not the black teachers or would-be teachers who have been discriminated against because of their race. The district court's examination of the School Committee's recruitment, hiring, transfer and promotion policies was undertaken to determine whether those policies violated the rights of black Boston public school children. It is the rights of those children that the order in issue is intended to protect. [cite omitted] In its effort to eliminate segregation and its effects 'root and branch', *Green v. County School Board,* 391 U.S. 430, 438 (1968), the court's equitable power to fashion a remedy is both broad and flexible. *Swann v. Charlotte-*

Mecklenburg Board of Education, 402 U.S. 1, 15 (1971)." 530 F. 2d at 432.

To remedy the effects of the discrimination found in the failure to hire and promote black administrators, the District Court on February 24, 1976, entered its order for desegregation of Administrative Staff (AA23).[2] This order, like the faculty orders required the one-for-one appointment of black and white administrators, until the "shortage" (less than 20%) of black administrators within the school system was eliminated. Thereafter, one-for-one appointments were to be made to certain positions (Category III) that continue to have a "shortage", and recruitment was to continue until blacks constituted 25% of the administrators in the school system (AA28, 33).

Plaintiffs, in 1978, sought further relief to bring about the desegregation of the faculty, as the school defendants had violated the court's outstanding orders. On July 5, 1978, the court amended its faculty hiring orders to require that there be an annual increase of 1½% black teachers until the shortage of black teachers is eliminated (A6).

In the fall of 1980, BTU and BASAS entered into collective bargaining agreements with the school defendants, which included provisions for the layoff of teachers and administrators respectively (AA35; TA31). These provisions were made "subject to federal laws and lawful orders issued pursuant thereto". (AA38; TA35). Such orders included the July 5, 1978 memorandum and further orders on faculty recruiting and hiring and the February 24, 1976

---

2. The various appendices shall be cited as follows: "A" for the appendix which accompanies this response; "AA" for the appendix filed with the administrators' (BASAS) petition and "TA" for the appendix filed with the teachers' (BTU) petition.

order for desegregation of administrative staff, discussed above, with which full compliance had yet to be achieved.

In the spring of 1981, the school defendants sought to modify these orders calling for the elimination of the "shortage" of black teachers and administrators in the Boston Public Schools. As to teachers, the school defendants sought to maintain the prevailing percentage of blacks, thereby deferring compliance with the court's goal of 20% (A11). In contrast, as to administrators, the school defendants sought to layoff blacks, thereby reestablishing a shortage of black headmasters and principals (A14).

On June 2, 1981, the District Court allowed, with minor modification, the school defendants' motion which called for the proportional sharing of the burden of the reduction in force, so that the desegregation process of black teachers would be maintained at the then current level (19.09%), throughout any layoffs (TA18).

But it rejected the school department's request to reduce the percentage of black headmasters and principals from 20.53 to 13.8% (AA17-19).

The Boston Teachers Union and the Boston Association of School Administrators and Supervisors took appeals from these two orders on behalf of their white members. The school defendants have taken no appeals from these orders; indeed the school department opposes the petition for certiorari being sought by the Boston Teachers Union.

On February 17, 1982, the Court of Appeals for the First Circuit upheld the District Court's orders of June 2, 1981 and July 9, 1981, which maintained the desegretion of the faculty and staff of the Boston Public Schools. *Morgan v. O'Bryant*, 671 F. 2d 23 (1st Cir. 1982).

REASONS FOR DENYING THE WRIT

I.

The District Court's orders for the desegregation of the faculty and administration of the Boston school system were proper.

The District Court properly ordered[3] the desegregation of the faculty and administration within the Boston Public Schools, given its finding of discriminatory hiring practices by the school defendants, which operated to deny black students an equal educational opportunity. (*Morgan, supra,* 379 F. Supp. at 461.)[4]

---

3. The primary orders setting out the duty of the school defendants to desegregate the faculty and administration are: Memorandum and Orders on Faculty Recruiting and Hiring, January 28, 1975 [*Morgan, supra,* 388 F. Supp. 581 (1975)]; the Order for Desegregation of Administrative Staff, February 24, 1976 (AA23); and the Memorandum and Further Orders on Faculty Recruiting and Hiring, July 5, 1979 (A5). The memorandum and orders on faculty recruiting and hiring has been upheld in an appeal taken by the BTU; certiorari was denied. No appeal was taken from the other orders.

4. The use of race-conscious remedies for racial discrimination is in accordance with recent decisions of this Court. *See, e.g., Fullilove v. Klutznick,* 448 U.S. 448 (1980); *Regents of the University of California v. Bakke,* 438 U.S. 265 (1978). Also, hiring goals have been permitted to eliminate the effects of past discrimination. *Associated General Contractors v. Altschuler,* 490 F. 2d 9 (1st Cir. 1973), *cert. denied,* 416 U.S. 957 (1974); *Boston Chapter of the N.A.A.C.P., Inc. v. Beecher,* 504 F. 2d 1017 (1st Cir. 1974), *cert. denied,* 421 U.S. 910 (1975); *Morrow v. Crisler,* 491 F. 2d 1053 (5th Cir. 1974) (*en banc*) *cert. denied,* 419 U.S. 895 (1975). And it was proper, on the facts before the District Court (as borne out by subsequent experience) for it to find that but for the unlawful discrimination practiced by the school defendants. The percentage of blacks employed as teachers would reflect the percentage of blacks in the local population. (*Morgan, supra,* 388 F. Supp. at 583). As this Court has observed, "(a)bsent explanation, it is ordinarily to be expected that non-discriminatory hiring practices will in time result in a work-force more or less representative of the racial and ethnic composition of the population in the community from which the employees are hired." *International Brotherhood of Teamsters v. United States,* 431 U.S. 324, 339 n. 20 (1977).

As this Court has ruled, a district court "has not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past . . . ." *Green v. County School Board,* 391 U.S. 430, 438 n. 4 (1968), *quoting Louisiana v. United States,* 380 U.S. 145, 154 (1965).

II.

The District Court orders of June 2, 1981 were proper.

The June 2, 1981 orders of the District Court, which modify memorandum and further orders on faculty recruiting and hiring, satisfies the controlling equitable principles enumerated by this Court for eliminating *de jure* segregation. *Milliken v. Bradley,* 433 U.S. 267, 280 (1977).

In the first instance, the orders flowed from the school defendants' unconstitutional hiring practices (*Morgan, supra,* 379 F. Supp. at 463), as well as, the denial of an equal educational opportunity for black students, due to a segregated work force. *Morgan, supra,* 379 F. Supp. at 461.

Secondly, the orders were remedial in that their purpose was to effectuate compliance with the teacher desegregation orders, in spite of layoffs, thereby continuing "make whole" relief for plaintiffs. *Milliken, supra* at 281-82; *Brown v. Neeb,* 644 F. 2d 551, 563-64 (6th Cir. 1981). By maintaining black and other minority teachers in proportionate percentages, the District Court was insuring a plan that "promises realistically to work *now*". *Green, supra,* at 439. Compliance with these orders would operate to restore plaintiffs in two respects: first, by achieving the hiring goal, the shortage of black teachers caused by discrimination would

be eliminated; and secondly, the equal educational opportunity for black students would be enhanced.[5]

---

5. The desegregation of the personnel is integral to the desegregation of the entire school system. As this Court has noted, "(F)aculty and staff desegregation (is) . . . a goal that we have recognized to be an important aspect of the basic task of achieving a public school system wholly free from racial discrimination." *United States v. Montgomery County Board of Education*, 395 U.S. 225, 231-32 (1969). *See also, Milliken v. Bradley, supra*, 433 U.S. at 282-83; *Oliver v. Kalamazoo Board of Education*, 368 F. Supp. 143, 176-77, 180 (W.D. Mich. 1973), *affirmed*, 508 F. 2d 178, 185 (6th Cir. 1974), *cert. denied*, 421 U.S. 963 (1975); *Arthur v. Nyquist*, 415 F. Supp. 904, 943-48 (W.D.N.Y. 1976), *affirmed in pertinent part*, 573 F. 2d 134, 145 (2d Cir. 1978), *cert. denied*, 439 U.S. 860 (1978).

The positive effect of faculty desegregation on student desegregation has been recognized by several studies and has been incorporated in our federal policy. For example, a 1970 report of the Boston Public Schools recommends:

> ". . . Black representation at all levels in the Boston School Department, [is] a goal necessary to provide role models for Black children; . . . to foster greater sensitivity in the schools to the needs and aspirations of all the citizens of Boston; . . . to achieve an excellence and sophistication in the educational system which a great city deserves and which only true diversity of students and staff can accomplish." - *Organizing an Urban School System for Diversity: A Report on the Boston Public School Department*, Joseph M. Cronin, October 1970, pp. 170-71.

Also, the U.S. Senate Select Committee on Equal Educational Opportunity and the U.S. Commission on Civil Rights have reached similar conclusions, for as they have reported:

> "To encourage the development of supportive classroom environment, we recommend that implementation of plans for school integration be accompanied by: First, integration of faculty and staff. . ." - *Toward Equal Educational*

(Cont'd)

The third factor for judging the appropriateness of the District Court's orders, *i.e.*, "(T)he federal courts in devising a remedy must take into account the interests of state and local authorities in managing their own affairs consistent with the Constitution," (*Milliken, supra* at 280-81), is also met in the instant case. The decree which the District Court entered on June 2, 1981 is in most parts the plan urged by the school defendants (A12); and supported by plaintiffs.

III.

The District Court's orders of July 9, 1981 were proper.

The July 9, 1981 orders were proper, as they denied the school defendants' motion for modification of administrators desegregation orders (A14), thereby continuing in effect the outstanding orders of the District Court.

Clearly, there is no issue that the orders were related to a violation found by the District Court, the discriminatory employment practices of the school defendants.

Also, as in the case of the teachers (*see* discussion at page 8), the District Court's interpretation of the outstanding order

---

(Cont'd)

Opportunity, Report No. 92-000, 92nd Congress, 2d Session, pp. 270-71.

"Adequate minority representation on the school staff is critical to integrated education. Just as student exposure to students of other races and ethnic groups helps develop racial understanding, tolerance, and appreciation, so also does the presence of a multiracial and multiethnic staff." *Fulfilling the Letter and Spirit of the Law, Desegregation of the Nation's Public Schools*, August 1976, p. i.

for the desegregation of administrative staff to require the maintenance of the desegregation progress which had been achieved, was for the dual remedial goals of employing black administrators to overcome a particular violation and of providing an equal educational opportunity to black students. (*See* n. 4, *supra.*)

The only question is whether the District Court was bound to accept the school defendants' proposal to drastically reduce the percentage of black principals and headmasters from 20.53 to 13.8%. While the District Court is expected to "take into account the interest" of the local school officials, it must do so consistent with its duty to determine whether the officials are acting in "good faith" [*Brown v. Board of Education,* 349 U.S. 294, 299 (1955)], and "whether (their plan) hinders or furthers the process of school desegregation". *Wright v. Council of City of Emporia,* 407 U.S. 451, 460 (1972).

That the school defendants were not acting in good faith is evident by their recognition of their affirmative duty to maintain the desegregation of teachers, as contrasted to their abandonment of this position when it came to administrators, even though the condition to be remedied flowed from the same violation. The District Court recognized that the allowance of the school department's motion would not only have "hindered", but, in fact, dismantle the desegregation achieved by hiring black and other minority principals and headmasters.

IV.

The orders of June 2, 1981 and July 9, 1981 do not unnecessarily or invidiously trammel the interests of white teachers and administrators.

The District Court's orders of June 2, 1981 and July 9, 1981 do not unnecessarily or invidiously trammel the interest of white

teachers and administrators, as these orders do not bar whites from continued or future employment in these positions, or operate so as to stigmatize any white persons, either individually or collectively. *Regents of the University of California v. Bakke*, 438 U.S. 265, 373-75 (Brennan opinion) (1978); *Valentine v. Smith*, 654 F. 2d 503, 510-11 (8th Cir. 1981).

The effect of making layoffs proportionate to the prevailing racial/ethnic percentage within the school system is to equalize the burden of layoffs among the races. Therefore, while approximately 1,100 white teachers will have been laid off, so too will be approximately 280 black and 85 other minority teachers. Whereas, the number of principals and headmasters to be laid off is 14 white and one black. Similarly, with recall the current percentages are maintained.

Finally, as to the claim that these orders trammel white teachers' and administrators' collective bargaining rights, such a claim must fail for three reasons. One, as these challenged orders are proper and "lawful", the BTU and BASAS voluntarily subordinated the operation of their respective seniority provisions to the implementation of these orders (A4-38; TA35).[6]

Two, layoff provisions do not, as a general matter, create "indefeasibly vested rights. . .". *Franks v. Bowman Transportation Company*, 424 U.S. 747, 778-78 (1976) (court order pursuant to Title VII awarding retroactive seniority to victims of hiring discrimination, with impact on white employees); *Detroit Police Officers Association v. Young*, 608 F. 2d 671, 681, 696 n. 12 (alteration by City board under authority of City charter);

---

6. *See Pellicer v. Brotherhood of Railway and S.S. Clerk*, 217 F. 2d 205 (5th Cir. 1954), *cert. denied*, 349 U.S. 912 (1955) (Union and employer voluntarily modify seniority system to ameliorate past racial discrimination.)

Arthur v. Nyquist, 520 F. Supp. 961, 965 (W.D.N.Y. 1981); *Oliver v. Kalamazoo Board of Education*, 498 F. Supp. 732, 752-53 (W.D. Mich., S.D. 1980) (alteration by court order).

Three, the positioning of black and white teachers and administrators on their respective seniority lists has been skewed in favor of white teachers and administrators, due to the school defendants' failure to comply with the January 28, 1975 memorandum and orders on faculty recruiting and hiring, and the February 24, 1976 order for desegregation of administrative staff (A1, 6).

V.

The orders of the District Court are in accordance with the opinions from other circuits.

The orders of June 2, 1981 and July 9, 1981 are in accordance with decisions reached by courts in other circuits.[7] Therefore, this case does not present a situation of conflicting authority amongst the circuits, which requires the review of this Court.

---

7. *United States v. City of Miami*, 614 F. 2d 1322, 1335-42 (5th Cir. 1980); *Detroit Police Officer v. Young*, *supra*, at 694-98; *Brown v. Neeb*, 644 F. 2d 503, 507-12 (8th Cir. 1981); *Oliver*, *supra*, at 751-55; *Stotts v. Memphis Fire Department*, Nos. 81-5348 and 81-5349 (6th Cir. May 7, 1982); *Boston Chapter N.A.A.C.P. v. Beecher*, No. 82-1642 (1st Cir. May 11, 1982).

CONCLUSION

As the Court of Appeals observed in 1976, "While affirmative action to rectify past discrimination is more painful during a time of underemployment than in one of full employment, that fact is no excuse for inadequate action." (*Morgan, supra,* 530 F. 2d at 434), therefore, there was a continuing duty on the school defendants to desegregate the faculty and staff of the Boston Public Schools, in spite of layoffs.

The District Court's orders of June 2, 1981 and July 9, 1981 were not an abuse of discretion in light of the court's obligation to "make whole" plaintiffs, black parents and their children, and the harm that would have resulted from making layoffs based on "strict seniority".

For the foregoing reasons, the petitions for a writ of certiorari should be denied.

Respectfully submitted,

CAROLINE B. PLAYTER
National Lawyers Guild
DOYLE, PLAYTER, NOVICK
& BERKIN

KENNETH KIMERLING
PUERTO RICAN LEGAL
DEFENSE FUND INC.
Attorneys for Respondents
El Comite De Padres

LARRY J. JOHNSON
ROBERT PRESSMAN
CENTER FOR LAW &
EDUCATION
Attorneys for Respondents
Tallulah Morgan, et al.

APPENDIX

MEMORANDUM AND ORDERS ON PLAINTIFFS' MOTION AS TO ADMINISTRATOR DESEGREGATION FILED AUGUST 24, 1976

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CIVIL ACTION NO. 72-911-G

TALLULAH MORGAN ET AL.,

Plaintiffs,

v.

JOHN J. McDONOUGH ET AL.,

Defendants

September 3, 1976

GARRITY, J. Upon consideration of plaintiffs' motion for enforcement of the court's order on administrator desegregation, and after hearing counsel for the parties and considering affidavits accompanying the motion and exhibits offered at the hearing on August 27, 1976, the court makes the following findings, conclusions and orders:

Findings

* * * * * * * * * * *

2. For several reasons, a number of which are described in a report by the staff of the Citywide Educational Coalition (CWEC)[1] issued August 30, 1976 and entitled "The Promotional

Rating Process, an Analysis", the defendant superintendent and school committee did not carry out the court's order. One of the main reasons was that, after the completion of the screening process by screening committees established by the school committee votes in 1973 and adopted and modified in the court's February 24 order, only 23 black finalists were available to fill the 18 vacancies intended to be reserved for qualified black applicants. This relative shortage of black applicants was attributable in part to the defendants' having violated one of the provisions of the February 24 order, paragraph 2C at page 3, by a recruiting advertisement published in out-of-town newspapers which asserted incorrectly that a prerequisite for appointment was "appropriate Massachusetts administrative certificates (or eligibility)". The upshot was that at a hearing on August 11, 1976 the school committee filed a report on its actions pursuant to the February 24 order indicating that it had appointed 12 black candidates and 24 white candidates, instead of 18 of each group, to the 36 vacancies. The hearing on August 12 was attended by all of the school committee members and the court directed them to carry out the order and to reconsider their rejection of certain black candidates. The school committee reconsidered but did not make any changes in appointments previously made except to change certain of them to acting rather than permanent appointments in order not to violate the plain language of the February 24 order. The same

* * * * * * * * *

s/ W. Arthur Garrity, J.
United States District Judge

Memorandum and Orders

UNITED STATES DISTRICT COURT
For the District of Massachusetts

Civil Action No. 72-911-G

Tallulah Morgan et al.,

Plaintiffs,

vs.

JOHN J. McDONOUGH et al.,

Defendants

Before: Hon. W. Arthur Garrity, Jr.,
District Judge

Court Room No. 5
Federal Building
Boston, Massachusetts
June 16, 1978

Appearances:
Larry J. Johnson, Esq.,
for the plaintiffs.

Goodwin, Proctor & Hoar, Esqs., by
Marshall Simonds, Esq., and
Henry C. Dinger, Esq.,
for the defendant School Committee.

Robert H. Bohn, Esq.,
Assistant Attorney General,
for the state defendants.

Steven P. Perlmutter, Esq.,
Assistant Corporation Counsel,
for the non-School Committee city defendants.

Grady and McDonald, Esqs., by
James T. Grady, Esq.,
for the Boston Teachers Union.

Segal, Roitman & Coleman, Esqs., by
Richard W. Coleman, Esq.,
for the Boston Association of School
Administrators and Supervisors.

Doyle, Playter, Novick & Berkin, Esqs., by
Atty. Caroline B. Playter,
for El Comite de Padres por la Defensa
de la Educacion Bilingue.

Choate, Hall & Stewart, Esqs., by
W. Shaw McDermott, Esq.,
for the Boston Home and School Association.

THE COURT: . . . .

The Court rules that there has not been compliance with the one-to-one hiring requirement in the January 28, 1975, order. The total figures, of course, we know have not-- that is, the goals of hiring have not been achieved. That is given. The defendants have not employed this catchup feature of the January 1975, and the recruiting of minority faculty members has not produced the

hoped-for increase in the percentage of minority faculty in the school system.

It is also relevant that the mode of hiring which the Court had expected would be followed for the most part, with relatively minor exceptions, that is, the offer of permanent positions to new teachers, was not fulfilled. This was not, however, in violation of the order of January 28, 1975.

The Court's findings then -- and that concludes them-- are in terms of result; that is, the results have not been as ordered; but the Court is not making a finding as to the reason why the results were not achieved. I want to state the reason for the Court's intentionally omitting any finding on the matter of whether the failure to achieve the results ordered in January of 1975 were attributable to one reason or another.

MEMORANDUM AND FURTHER ORDERS ON FACULTY RECRUITING AND HIRING

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CIVIL ACTION NO. 72-911-G

TALLULAH MORGAN ET AL.,
Plaintiffs,

v.

JOHN J. McDONOUGH ET AL.,
Defendants.

July 5, 1978

GARRITY, J. The court has held a series of hearings on the issue of faculty desegregation and compliance with its orders of January 28, 1975 on faculty recruiting and hiring. On June 16, 1978 the court ruled that the school defendants had not complied in various respects with the January 1975 orders[1] and that further remedial orders would be entered. At a hearing on June 29, 1978 the court stated orally the gist of these further orders and gave its reasons for adopting some and rejecting other proposals of the parties.

The principal objective of the orders herein entered is to revive the catch-up feature of the January 28, 1975 orders which have

---

1. The court declined to rule whether this non-compliance had been willful, as asserted by plaintiffs, mainly because in our opinion a finding as to willfulness would be superfluous and serve no constructive purpose.

been frustrated by the defendants' discontinuing the appointment of permanent teachers and making a disproportionate number of white provisional teachers permanent by rehiring them until they obtain tenure. A provision in paragraph 6 of that order permitted rehiring of provisionsals; but was expected, in reliance upon representations of counsel representing the defendants at that time that they planned to discontinue hiring provisionals, to have limited and relatively minor applicability. Instead it turned out to be the exception which swallowed the rule. Another objective is the early identification of prospective vacancies in teaching positions so that meaningful recruitment of black and other minority applicants may be conducted.

The court has adopted generally the approach outlined by school defendants' counsel in closing argument by allowing the defendants flexibility in achieving faculty desegregation. The proposals by other parties for specific and narrowly focused relief are denied at this time, not so much for lack of merit as difficulty of monitoring. The court has frequently expressed its intention to disengage from active supervision of the school defendants' carrying out the student desegregation plan as soon as may be done consistently with the constitutional rights of the plaintiff class. The actions of the school committee organized at the beginning of this year justify, we believe, our reliance on orders that look to results more than to the means of achieving them. The mandatory annual (1½% increase in the percentage of black teachers in the school system as a whole is a minimum which, on the basis of abundant evidence at the hearings of past and predictable vacancies in teaching positions and taking declining student enrollments into account, we find to be readily attainable during the next several years without impairing the job security of teachers who are tenured or may be permanently appointed.

Memorandum and Further Orders

The further orders which follow do not replace but supplement previous applicable orders in the area of faculty desegregation which remain in effect unless specifically modified, especially those entered July 31, 1974, January 28, 1975 and August 20, 1975.

ORDERS

1. Paragraphs 6 and 8 of the court's orders dated January 28, 1975 are stricken.

2. Paragraph 1(c) of the January 28, 1975 orders is hereby amended by inserting the words "and given authority" after the words "be authorized" in line 22 of page 7, so that the provision in question will read, "the recruiters visiting the campuses shall be authorized and given authority to hire on the spot applicants who meet qualifications . . . ."[2]

3. In any year in which a shortage of black teachers exists, all hiring and rehiring of teachers, whether permanent or provisional, shall be done by the city defendants on the basis of one black teacher for one white teacher. For the 1978-79 school year only, this order shall not preclude the defendants from rehiring current third year provisionals;[3] however, in the event

---

2. At the hearing, defendants professed to construe the original order as merely giving them discretion to authorize on-the-spot hiring of qualified black applicants, a discretion which they declined to exercise.

3. At the hearing on June 29 the court stated that this exemption would apply to second as well as to third year provisionals. However, further analysis regarding their numbers and the likely number off vacancies for 1978-79 makes this change necessary.

the number of white third year provisionals rehired for 1978-79 exceeds the number of black provisionals rehired, only black teachers shall be hired or rehired until the one-to-one balance is restored. The hiring or rehiring of teachers of other minorities shall not count as the hiring or rehiring of a white or a black teacher.

4. Until a shortage of black teachers no longer exists, the city defendants shall see to it that the percentage of black teachers in the school system as a whole exceeds by at least one and one-half percent (1½%) said percentage during the previous school year. If recruiting and hiring procedures [4] in addition to those heretofore and herein ordered by the court should become necessary in order to achieve said annual increase, the city defendants shall select and adopt them, without further court order, sufficiently in advance of the beginning of the school year.

5. Although no specific goals are set regarding the rehiring and hiring of other minority teachers,[5] the city defendants shall use their best efforts to continue to increase the percentage of other minority teachers in the school system overall and in the area of regular education.

6. The reporting ordered in paragraph 9 of the January 28, 1975 orders shall be expanded as follows:

---

4. Examples include (a) offering applicants permanent instead of provisional teaching positions or monetary incentives such as moving expenses, (b) eliminating residency requirements, (c) modifying the excessing policy and (d) hiring only black and other minority teachers.

5. The record does not support the establishment of a specific goal for the hiring of other minority teachers. However, future developments may require the court to re-examine this ruling.

Memorandum and Further Orders

(a) The reports due March 15 and October 15 shall contain tables showing (i) the number and percentages of white, black and other minority teachers in regular, special, bilingual education for the current year and the previous three years, (ii) the number of black, white or other minority first, second and third year provisionals currently employed and provisionals hired for a fourth year (thereby becoming "permanent provisionals"), (iii) the number of newly hired provisional teachers for the current year and the previous three years subdivided by subject areas to which assigned and (iv) the same information set forth in iii as to newly appointed permanent teachers if the defendants resume their former practice of appointing permanent teachers.

(b) the following provision shall be added at the end of paragraph 9(a): "--prospective vacancies in teaching positions shall be listed as they become identified, whether or not to be filled by transfers of teachers or new appointees; and vacancies shall be asterisked or otherwise designated which are likely to be filled by newly hired teachers or rehired provisionals".

7. The Department of Implementation shall collaborate with the Department of Personnel in identifying prospective vacancies in teaching positions and relating the deployment of faculty to building needs and capacities and program locations resulting from the assignment of students so that vacancies in teaching positions may be ascertained as soon as possible. As the number of vacancies to be filled by new appointees becomes known, the Department of Implementation shall keep its recruiting specialists informed so that they may hire qualified black and other minority applicants on the spot.

s/ W. Arthur Garrity, Jr.
United States District Judge

SCHOOL DEFENDANTS' MOTION FOR MODIFICATION OF FACULTY DESEGREGATION ORDERS

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

C.A. No. 72-911-G

TALLULAH MORGAN, ET AL.,

Plaintiffs,

v.

JOHN O'BRYANT, ET AL.,

Defendants.

In light of the fiscal crisis facing the Boston Public Schools and the corresponding need to reduce dramatically the size of the teaching staff, the School Defendants move for modification of outstanding faculty desegregation orders in accordance with a draft order attached as Exhibit A to this motion. A memorandum of law accompanies this motion.

Respectfully submitted,

THE SCHOOL DEFENDANTS

By their attorneys,

Marshall Simonds
Henry C. Dinger
GOODWIN, PROCTOR & HOAR
28 State Street
Boston, Massachusetts 02109
(617) 523-5700

ORDER MODIFYING FACULTY DESEGREGATION ORDERS

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

C.A. No. 72-911-G

TALLULAH MORGAN, ET AL.,

Plaintiffs,

v.

JOHN O'BRYANT, ET AL.,

Defendants

The School Defendants remain under a court-ordered obligation during the 1981-82 school year to increase the percentage of black teachers until the percentage of black teachers is not less than 20%. This obligation exists whether the teaching force is expanding or contracting and the relevant collective bargaining agreements are expressly subject to this and other court-ordered obligations. Notwithstanding the orders imposing such an obligation, which remains in effect, the School Defendants shall be deemed to be in compliance for the 1981-82 school year with the outstanding orders if they implement the layoffs caused by the immediate fiscal crisis in accordance with the following procedure:

1. The layoffs will be performed in such a way that the systemwide percentage of black teachers will remain at the current level of 19.09%.

Order Modifying Faculty Desegregation Orders

2. Blacks will receive an absolute preference for recall until a 20% figure is reached systemwide.

3. Once this 20% figure is reached, no fewer than 20% of the teachers subsequently recalled will be blacks.

The obligation to engage in affirmative recruitment of black teachers until the relevant percentage equals 25% is suspended until all tenured teachers who will have been laid off have been recalled.

The obligations imposed by this and prior orders shall supersede any inconsistent state statutes, including Mass. G.L. c.71, §41.

_____

District Judge

MOTION FOR MODIFICATION OF ADMINISTRATOR DESEGREGATION ORDERS TO PERMIT REASSIGNMENT AND REDUCTION OF HEADMASTERS AND PRINCIPALS FOR THE 1981-82 SCHOOL YEAR BY MEANS OF SENIORITY

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Civil Action No. 72-911-G

TALLULAH MORGAN, et al.,

Plaintiffs

v.

JOHN O'BRYANT, et al.,

Defendants

On June 6, 1981, the Boston School Committee voted to conduct the reduction and reassignment of principles and headmasters in accordance with principles of strict seniority. The School Defendants move this Court for leave to do so and for the modification of outstanding orders governing administrator desegregation necessary to permit such action.

If the Court is disposed to deny this motion, the School Defendants request guidance from the Court regarding the application of the Court's orders governing administrator desegregation in a reduction in force context.

Respectfully submitted,

THE SCHOOL DEFENDANTS

Motion for Modification of Administrator Desegregation Orders

By their attorneys,

Marshall Simonds
Henry C. Dinger
GOODWIN, PROCTER & HOAR
28 State Street
Boston, Massachusetts 02109
(617) 523-5700